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No. 85-690

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

V.

SAMMIE FELDER, JR.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE FIFTH CIRCUIT'S HOLDING THAT THE SIXTH AMENDMENT REQUIRES LAW ENFORCEMENT AUTHORITIES TO OBTAIN COUNSEL'S EXPRESS CONSENT PRIOR TO COMMUNICATING WITH THE ACCUSED FOR PURPOSES OF ASCERTAINING WHETHER THE ACCUSED DESIRES TO WAIVE HIS SIXTH AMENDMENT RIGHT TO COUNSEL VIOLATES THIS COURT'S RECOGNITION IN *BREWER V. WILLIAMS*, 430 U.S. 387 (1977) THAT AN ACCUSED MAY, WITHOUT NOTICE TO COUNSEL, WAIVE HIS SIXTH AMENDMENT RIGHT AND WHETHER SUCH HOLDING CONSTITUTES AN IMPROPER DELEGATION TO COUNSEL OF AN ACCUSED'S PERSONAL SIXTH AMENDMENT RIGHT?

II. WHETHER THE FITH CIRCUIT'S CATEGORIZATION OF FELDER'S EXPRESS STATEMENT OF WAIVER OF COUNSEL GIVEN SIMULTANEOUSLY WITH THE SIGNING OF HIS WRITTEN CONFESSION AS AN "AFTER-THE-FACT CONFIRMATION" AND ITS REFUSAL TO CONSIDER SUCH EXPRESS STATEMENT IN DETERMINING WHETHER FELDER WAIVED HIS SIXTH AMENDMENT RIGHT OF COUNSEL CONTRAVENES THE "TOTALITY OF THE CIRCUMSTANCES TEST" ENUNCIATED IN *JOHNSON V. ZERBST*, 304 U.S. 458 (1938)?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 5, 1985, rehearing denied on August 23, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 765 F.2d 1245, *reh. denied,* _____F.2d_____ (5th Cir. 1985) (Appendices A and B). The Memorandum and Order of the United States District Court for the Southern District of Texas, Houston Division, appears as Appendix C.

JURISIDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 5, 1985. A timely filed peti-

tion for rehearing was denied August 23, 1985. This petition for writ of certiorari is filed within ninety days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assitance of Counsel for his defence.

United States Constitution, amend. XIV, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner has custody of Respondent pursuant to a judgment and sentence of the 180th Judicial District Court of Harris County, Texas, in Cause No. 227815, styled *The State of Texas v. Sammie Felder, Jr.*. On May 7, 1975, Respondent was indicted for the offense of capital murder of James Hanks, while in the course of committing robbery, to which he entered a plea of not guilty. A jury found Respondent guilty of capital murder on May 21, 1976, and on May 24, 1976, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to article 37.071, Tex. Code Crim. Proc. Ann. (Vernon 1981). Accordingly, punishment was assessed at death.

Respondent appealed this conviction and sentence to the Texas Court of Criminal Appeals, which affirmed on April 26, 1978. *Felder v. State,* 564 S.W.2d 776 (Tex. Crim. App. 1978). Certiorari was denied on March 5, 1979. *Felder v. Texas,* 440 U.S. 950 (1979).

On March 11, 1980, Respondent was formally sentenced to death before sunrise on June 11, 1980. Respondent filed a state application for writ of habeas corpus and motion for stay of execution pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1985) on May 29, 1980. The Texas Court of Criminal Appeals denied all requested relief on June 2, 1980. *Ex Parte Felder,* Application No. 3335.

On June 4, 1980, Respondent filed his application for writ of habeas corpus and stay of execution in the United States District Court for the Southern District of Texas, Houston Division, *Felder v. Estelle,* Civil Action No. H-80-1220, and a stay was entered on that date. On October 7, 1981, after extensive briefing on the merits of the claims and immediately prior to a scheduled evidentiary hearing, Respondent filed an amended application raising unexhausted claims. The case was subsequently dismissed without prejudice on Respondent's motion. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, which reversed the district court's decision on December 14, 1982, and remanded with instructions to reach the merits of Respondent's claims. *Felder v. Estelle,* 693 F.2d 549 (5th Cir. 1982).

On April 24, 1984, the district court entered an order denying Respondent's application on the merits of each claim presented. *Felder v. Estelle,* Civil Action No. H-80-1220 (S.D.Tex. April 24, 1984). The Court of Appeals reversed on the ground that Respondent's sixth amendment right to counsel was violated by the admission of Respondent's confession. *Felder v. McCotter,* 765 F.2d 1245 (5th Cir. 1985).

B. Statement of Facts

On March 14, 1975, Respondent was employed as an aide at an apartment complex for paralyzed people. In the early morning hours of March 15, 1975, James Hanks, a quadriplegic,

was found in his apartment with numerous stab wounds about his head and neck. A pair of scissors, customarily kept on Hanks' bedstand, and his wallet, normally kept under his pillow, were missing. Hanks lived for four days without regaining consciousness. The cause of his death was a stab wound to the left temple.

On April 10, 1975, Edith Cobb, a resident of Denver, Colorado, contacted the Denver Police Department and related Respondent's admission to murdering and robbing a man in Texas while on his job. On that same date, the Denver Police Department contacted the Houston Police Department by radiogram and oral contact between the two offices was made. On April 11, 1975, a felony complaint was sworn charging Respondent with intentionally causing the death of Hanks and filed in the Justice of the Peace Court in Harris County, Texas, and a fugitive warrant issued. The warrant was sent via telegram from Houston to Denver and a nationwide all-points bulletin issued (SF VIII 3767-69).[1]

Respondent was stopped driving a car bearing Colorado license plates in Idaho Falls, Idaho, on April 14, 1975, for a traffic violation (SF VIII 3250-51, 3256-81). He refused to tender a driver's license and gave the police a false name (SF VIII 3252-54). He was then administered *Miranda*[2] warnings, arrested and placed in the Idaho Falls city jail (SF VIII 3254-55).

On April 15, 1975, information as to Respondent's arrest was transmitted to the Houston police (SF VIII 3178), who immediately requested that Respondent be held on the Texas warrant for capital murder (SF VIII St. Exh. 29 at 3513, St. Exh. 38 at 3518), and telegraphed a warrant to Idaho (SF VIII 3135).

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1. "SF" refers to the statement of facts of Petitioner's 1976 trial. Volume reference is made to the roman numeral located in the center of each cover and page number reflected in the lower left-hand corner. "ROA" refers to the record on appeal to the United States Court of Appeals for the Fifth Circuit.

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

On that same date, Respondent was taken before an Idaho Falls magistrate for a probable cause hearing on a felony charge of fugitive from justice from Colorado, advised of his statutory rights, and requested the appointment of an attorney (SF VIII 3299, St. Exh. 38 at 3518). A warrant for auto theft issued at that time (SF VIII St. Exh. 38 at 3518). Idaho attorney John Insinger was appointed at the indigency hearing held later that afternoon (SF VIII St. Exh. 38 at 3518). Represented by Insinger, Respondent appeared before a magistrate on April 16, 1975, and waived extradition to Colorado (SF VIII St. Exh. 38 at 3518). He appeared with Insinger again on April 18, 1975, and waived extradition to Texas (ROA 72).

According to Insinger's affidavit,[3] he was contacted by Detectives Sibbert and Scott of the Idaho Falls city police regarding questioning of Respondent:

> On at least one occasion I carefully and explicitly told Detectives Sibbert and Scott of the Idaho Falls police that I did not want my client questioned or interrogated unless I was present. This came about when they affirmatively sought my permission to question Mr. Felder regarding a homicide that had taken place in Denver, Colorado. I said that I would see what Mr. Felder wanted to do, but I warned them that in no event were they to talk with him unless I was present. They agreed. When I spoke with Mr. Felder, he was very willing to talk with the authorities. I cautioned him—as I had many times previously—that I did not want him to talk to the authorities or give any statements unless I was present.

(ROA 72-73). With Insinger's consent, the Idaho Falls police questioned Respondent and obtained three waivers of counsel. The first form, entitled "Advising of Rights and Waiver," was signed on April 15, 1975, prior to questioning by Idaho authorities concerning extradition to Colorado; the second was signed on April 16, 1975, by both Insinger and Respondent

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3. Filed in the federal district court pursuant to Respondent's habeas corpus action. (*See also* Tr. 92-96).

prior to an interview with Idaho authorities concerning extradition to both Colorado and Texas (SF 279); and the third was signed later in the day on April 16, 1975, by Respondent prior to inquiry by Idaho authorities as to whether Respondent would take a polygraph examination. (*See* SF VIII 3302-07). Insinger was present at least on one of those occasions (SF VIII 3307). At the time the second and third were signed, the Idaho police were aware of the Texas warrant, but no interrogation was conducted concerning the Texas offense (SF VIII 3300-05).

On April 16-17, 1975, an unidentified detective with the Houston Police Department contacted Insinger regarding Respondent's extradition to Texas (SF I 95-96; ROA 72). It was Insinger's statement that this officer implied to him that the state prosecutor probably wouldn't prosecute the case as capital murder (SF I 95).[4]

Houston police officer J.W. Clampitte was dispatched to Idaho Falls to return Respondent to Texas on April 22, 1975 (SF I 232; VIII 3178-79). Prior to any communication with Respondent, Officer Clampitte spoke with the Idaho authorities and was given a rundown on the paperwork. Specifically, Officer Clampitte was informed that Petitioner had been taken before a magistrate on at least one occasion and appointed an attorney for the extradition proceeding (SF I 234; VIII 3191, 3209); that he had signed a waiver of extradition and a waiver of his rights form (SF I 246, 249; VIII 3181-83, 3208); and that the extradition proceeding was completed (SF I 258; VIII 3208).

Officer Clampitte neither spoke to Insinger about the extradition proceeding nor informed him of his intent to interrogate Respondent (SF I 235; VIII 3209-10, 3225-26). His reasons for not doing so are best summarized with Clampitte's own words:

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4. Insinger added in his affidavit filed in the federal district court that the Houston officer stated he would recommend to the district attorney that Respondent be prosecuted on a lesser charge if Respondent would waive extradition (ROA 72).

> Well, my interpretation of what they told me, [Insinger] had been appointed to represent Mr. Felder for extradition proceedings and the rights there, and I was to take him back to Houston. So during the course of my investigation, I saw no need to talk to [Insinger] at that time.

(SF VIII 3214).

> As far as I was concerned at that time his attorney, his business with this attorney at that time had apparently been terminated due to the waiver of extradition.

(SF VIII 3233).

Officer Clampitte spoke with Respondent around noon on August 23, 1975. He initially read Respondent his *Miranda* warnings off the standard police-issued card (SF I 246-49; VIII 3189-91, 3216, 3220-24). He specifically asked Respondent if he had been represented by an attorney, if he had talked to that attorney, and Respondent responded simply that he had (SF I 244; VIII 3191, 3229). Respondent was given the opportunity to invoke his right to counsel, which he did not exercise:

> I mentioned to him that he had an attorney representing him earlier, so that if he wished to ask for this attorney he may do so at this time. He just said yes that he had an attorney representing him.

(SF VIII 3229). (*See also* I 244, 254; VIII 3191-93, 3229-30, 3735-36).

Respondent initially denied any knowledge of the offense (SF I 326; VIII 3217). After about 10-15 minutes of discussion with Officer Clampitte as to the information possessed by the Houston police and after Clampitte acknowledged that Respondent's conscience was probably bothering him (SF I 236-43; VIII 3215-20), Respondent related orally the facts of the offense. Prior to reducing the oral statement to writing, Respondent was again administered *Miranda* warnings (SF I 248; VIII 3194-95). After the statement was typed, the state

ment was read to and read by Respondent and signed (SF I 252; VIII 3193-94, 3236). The statement signed by Respondent contained an express statement of waiver of his right to counsel (SF VIII St. Exh. 35 at 3515).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Fifth Circuit has decided two important and interrelated questions of federal law. The first issue presented in this case concerns the circumstances under which an accused may waive his sixth and fourteenth amendment right to counsel without notice to or consultation with counsel. The court below imposed on law enforcement authorities an obligation to contact counsel and to obtain counsel's express consent to interrogation. This requirement absolutely forbids police officials from initiating contact with the accused to ascertain whether the *accused* desires to waive his right to counsel. It forecloses the possibility recognized in *Brewer v. Williams*, 430 U.S. 387, 405-06 (1977) that an accused may, without notice to counsel, waive his rights under the sixth and fourteenth amendments, and represents an improper delegation of the accused's personal sixth amendment right to counsel. Because this issue involves the question of whether the sixth amendment requires police officials to refrain from questioning an accused once formal judicial proceedings have been instituted unless the accused initiates contact with the police, a question which this Court has recognized to be of constitutional importance by the granting of certiorari in *Michigan v. Jackson*, _____U.S._____, 105 S.Ct. 2654 (1985), this Court should grant certiorari in this case.

The second issue presented in this case concerns the Fifth Circuit Court of Appeals' application of the totality of the circumstances test enunciated in *Johnson v. Zerbst*, 304 U.S. 458 (1938). In purporting to apply this standard to the issue of whether Respondent waived his sixth amendment right to counsel, the court below in fact created an inflexible *per se* rule

that no waiver may be found unless the accused makes an express statement disavowing counsel prior to any questioning by the police. Express statements of waiver made simultaneously with the giving of an answer or making of a statement were wholly discounted as "after-the-fact confirmations." Since this rule respresents an unwarranted restriction of the "totality of the circumstances" test, this Court should grant the writ to review the lower court's decision.

II.

AN ACTUAL CONFLICT EXISTS BETWEEN LOWER COURTS AS TO WHETHER THE SIXTH AMENDMENT RIGHT TO COUNSEL WHICH HAS ATTACHED BECAUSE OF THE INSTITUTION OF FORMAL JUDICIAL PROCEEDINGS REQUIRES POLICE OFFICIALS TO REFRAIN FROM INITIATING CONTACT WITH AN ACCUSED TO DETERMINE WHETHER THE ACCUSED IS WILLING TO WAIVE HIS RIGHT TO COUNSEL.

In *Brewer,* this Court recognized that it is possible for an accused to waive counsel without notice to counsel, 430 U.S. at 405-06, but the Court did not and has not since made clear how that is to be done. The result of such lack of guidance has been conflicting decisions in the lower courts as to whether law enforcement authorities may initiate further contact with a criminal suspect to determine if he is willing to waive his sixth amendment right to counsel for purposes of procuring a confession once the sixth amendment right has attached by the institution of formal judicial proceedings.

The decision of the court below forecloses that possibility in all cases. It imposes on law enforcement officers a duty to secure counsel's express consent to interrogation prior to communicating with the criminal suspect to ascertain whether the criminal suspect desires to waive his sixth amendment right to presence of counsel during custodial interrogation. A contrary holding was reached in *State v. Wyer,* 320 S.E.2d 92 (W.Va. 1984), wherein the West Virginia Supreme Court refused to equate a general request for counsel at arraignment as foreclosing police officials from inquiring of the accused whether

he would be willing to waive his sixth amendment right. Under the *Wyer* rule, once the sixth amendment right to counsel has attached because of the institution of formal judicial proceedings and the accused has not previously made his desire for presence of counsel during interrogation manifest, police officials may initiate contact with the accused without notice to counsel. If at the time waiver is sought, the accused makes known his desire to secure presence of counsel during interrogation, then all questioning must cease unless the accused initiates communications with the police. *Id.* at 105.

The issue whether the sixth amendment requires police officials to refrain from any questioning of an accused after institution of formal judicial proceedings unless the accused himself initiates the contact is presently before this Court by the May 28, 1985, granting of certiorari in *Michigan v. Jackson*, _____U.S._____, 105 S.Ct. at 2654. Although the court below did not expressly hold that an accused must initiate the contact with law enforcement authorities before a waiver of his right to counsel without notice to counsel may be found, that is the practical effect of its decision. Thus, the issue of whether an accused must initiate contact with police officials is a central question to the issue whether police officials may initiate discussion with the accused to determine if he is willing to waive his sixth amendment right to presence of counsel during interrogation.

The issue in this case is complicated by the fact that the question of whether counsel may assert an accused's sixth amendment right for him has not yet been resolved by the Court. The court below presumed that counsel could assert Respondent's sixth amendment right to presence of counsel during interrogation. This Court in *Brewer* did not directly address the issue, nor was it necessary that the Court do so. In *Brewer*, it was the accused himself who initially requested counsel and stated his desire to speak only in counsel's presence. This distinction was summarily brushed away by the court below.

In the fifth amendment context, this Court has held that the privilege against self-incrimination is a personal one which may not be invoked by a third party acting on behalf of the defendant. *Couch v. United States*, 409 U.S. 322 (1973). It follows

logically that the same is true in the sixth amendment context. Indeed such was the express recognition by Chief Justice Burger dissenting in *Brewer*:

> [C]onstitutional rights are *personal*, and an otherwise valid waiver should not be brushed aside by judges simply because an attorney was not present. The Court's holding operates to "imprison a man in his privileges," *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 280, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942); it conclusively presumes a suspect is legally incompetent to change his mind and tell the truth until an attorney is present. It denigrates an individual to a nonperson whose free will has become a hostage to a lawyer so that until the lawyer consents, the suspect is deprived of any legal right or power to decide for himself that he wishes to make a disclosure. It denies that the rights to counsel and silence are personal, nondelegable, and subject to waiver only by that individual.

430 U.S. at 419.

The difficulties presented in this case are more acute because the right to counsel attached at a time when the Texas officers were conducting routine police investigation. Respondent's immediate flight from Texas precluded the Texas officers from fully investigating his connection with the offense. It was only by securing his detention in the arresting state that this investigation could continue. The issuance of the arrest warrant and, hence, the institution of formal judicial proceedings[5] was necessary to effectuate further investigation. At the point of the initiation of interrogation, the adverse positions of the government and Respondent had not been solidified. To expect law enforcement authorities faithfully conducting routine investigations to comprehend completely the legal technicalities in the attachment of the sixth amendment right is unreasonable, especially when the courts themselves have been unable to agree on what the constitution requires. *See*

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5. *See Barnhill v. State*, 657 S.W.2d 131 (Tex. Crim. App. 1983).

State v. Wyer, 320 S.W.2d at 103-105, and discussion therein. The need for this Court's guidance and instruction is great.

The focus of waiver must be on the accused's state of mind and conduct, not counsel's. Where, as here, the sixth amendment right to counsel attaches not because of a request by the accused but because of the issuance of a felony arrest warrant necessary to secure the accused's detention in the arresting state and ultimate extradition back to the state where the offense was committed, the requirement that law enforcement officials secure counsel's express consent to interrogation deprives law enforcement officials of any opportunity to ascertain the accused's desires. Petitioner urges this Court not to foreclose that opportunity to law enforcement authorities.

III.

THE FIFTH CIRCUIT HAS SEVERELY NARROWED THE TOTALITY OF THE CIRCUMSTANCES TEST FOR DETERMINING WAIVER OF THE ACCUSED'S SIXTH AMENDMENT RIGHT TO COUNSEL INTO AN INFLEXIBLE *PER SE* RULE BY REFUSING TO RECOGNIZE AS RELEVANT TO THAT DETERMINATION AN EXPRESS STATEMENT OF WAIVER MADE AFTER INCRIMINATING STATEMENTS HAVE BEEN GIVEN.

The lower court's characterization of Respondent's express statement of waiver given after the making of an oral incriminating statement and simultaneously with the signing of his written confession as an "after-the-fact confirmation" and its staunch refusal to consider such express statement of waiver as a relevant factor in determining whether Respondent voluntarily relinquished his right to counsel contravenes the standard of review enunciated by this Court in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938):

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

By holding that a criminal defendant must explicitly disavow his counsel prior to the police asking any questions in order to relinquish his right, the lower court has effectively created an inflexible *per se* rule for determining waiver of the sixth amendment right to counsel.

This Court has strongly suggested that a *per se* rule against waiver of a sixth amendment right to counsel will not be sanctioned. In *North Carolina v. Butler,* 441 U.S. 369 (1979), the notion that an express written or oral statement of waiver is invariably necessary to support a finding of waiver was rejected outright. Although *Butler* involved a waiver of fifth amendment rights, it expressly recognized the applicability of the totality of the circumstances test even when a right so fundamental as that to counsel at trial is involved. 441 U.S. at 374-75. Likewise, Justices White, Blackmun and Rehnquist dissenting in *Brewer* rejected any interpretation of waiver as a "formalistic concept" requiring express statements. 430 U.S. at 435-36. This Court has already recognized the existence of an important constitutional question and the need for the Court's guidance as to the standard to be applied for determining waiver of the sixth amendment right to counsel by granting a writ of certiorari in *Michigan v. Jackson,* _____U.S. at _____, 105 S.Ct. at 2654.

The question of whether post-admission responses are proper considerations to the waiver of the sixth amendment right to counsel issue has never been addressed by the Court. Again, Justices White, Blackmun and Rehnquist dissenting in *Brewer* have suggested that a waiver may be given simultaneously with the giving of an answer or making of a statement. 430 U.S. at 436. In *Smith v. Illinois,* _____U.S._____, _____, 105 S.Ct. 490, 495 (1984), the Court held that a post-request-for-counsel response is relevant to the distinct question of waiver. The extent to which *Smith* is applicable to situations where, as here, the sixth amendment right attaches not as the result of a request for counsel but the issuance of a felony arrest warrant and the institution of extradition proceedings is by no means clear.

The facts in this case clearly indicate Respondent's desire to communicate with the police without presence of counsel. Insinger's own statement bears out this fact:

> When I spoke with Mr. Felder, he was *very willing* to talk with the authorities. I cautioned him—*as I had many times previously*—that *I* did not want him to talk to the authorities or give any statements unless I was present (emphasis added).

(ROA 71-72). There is no question that Respondent understood Officer Clampitte's purpose was to interrogate to obtain information concerning the Texas capital murder. It is further clear that Respondent understood the rights guaranteed him and understood the effect of waiving his rights during the interview. He so testified at trial. Moreover, Respondent was no novice to the criminal justice system, having previously been sent to the penitentiary three times, convicted of a "bunch" of misdemeanors, and having been released on bond shortly before committing this offense (SF I 264-65).

Officer Clampitte's administration of *Miranda* warnings and his initial discourse with Respondent concerning his prior representation by counsel take on particular significance in this context. After administering the warnings, Officer Clampitte specifically asked Respondent if he had been appointed an attorney, to which Respondent responded simply that he had. Officer Clampitte, believing the attorney had been appointed only on the extradition proceedings and being aware that Respondent had previously signed a waiver of counsel form, clearly afforded Respondent an opportunity to request Insinger's presence at the interrogation, but Respondent declined to do so. Although Officer Clampitte's administration of warnings and inquiry into Respondent's prior representation alone do not effectuate a waiver and do not sanction interrogation, Respondent's receipt of such information does demonstrate that he had explicit information as to available alternatives immediately prior to communicating with the police. Moreover, his refusal to assert his right to have Insinger present during the interview, viewed in light of Insinger's statement that Respondent was very willing to talk with the authorities and Insinger's express instructions to Respondent not to speak with the authorities outside his presence, as well as Respondent's clear understanding as to the availability of Insinger and of the degree to which Insinger could represent him, represents a clear indication that Respondent desired to communicate with

Clampitte without Insinger's assistance. Finally, regardless whether Respondent's express statement of waiver made at the time his oral confession was reduced to writing may be characterized as an "after-the-fact confirmation," it is a confirmation of the fact that Respondent intended to relinquish his right to counsel.

This Court should grant certiorari to reject the Fifth Circuit's adoption of a *per se* rule for determining waiver of a sixth amendment right. Where, as here, a criminal suspect's knowledge of his right to counsel and intent to relinquish it are manifest, a finding of waiver should not be refused simply because the express statement disavowing counsel was made simultaneously with the signing of the written confession.

CONCLUSION

For these reasons, Petitioner prays that the petition for certiorari to the United States Court of Appeals issue.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-2336

SAMMIE FELDER, JR.,
Petitioner-Appellant,

versus

O.L. McCOTTER, Director
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

August 23, 1985

Before RUBIN, JOLLY, AND DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

entered for the court:

/s/
United States Circuit Judge

APPENDIX B

Sammie FELDER, Jr.,
Petitioner-Appellant,

v.

O.L. McCOTTER, Director, Texas Department of Corrections,
Respondent-Appellee.

No. 84-2336

United States Court of Appeals,
Fifth Circuit.

July 5, 1985.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

After counsel for a person who has been charged with and arrested for a criminal offense has directed the police not to interrogate the accused in the absence of counsel, a confession elicited from the accused by police questioning in counsel's absence is inadmissible even though the police have given him a *Miranda* warning. The accused's response to the questioning is not a waiver of his previously-asserted right to the assistance of counsel. We therefore, hold that the accused's sixth amendment right to counsel in this capital case was violated by the admission of a confession thus obtained and that the admission of the confession elicited by this violation was not harmless. Accordingly, we reverse the district court judgment denying his application for habeas corpus and remand for issuance of the writ unless the State shall commence a new trial within ninety days after the issuance of our mandate.

I.

James Hanks, a quadraplegic, was brutally killed in the course of a robbery committed in Houston, Texas. Almost a month later, on April 11, 1975, a Houston police officer filed

an affidavit and felony complaint in the Harris County Justice of Peace court charging Sammie Felder, Jr., with capital murder.[1] On the same day the Texas court issued a fugitive warrant for Felder's arrest. Three days later, Idaho police stopped Felder in Idaho Falls, Idaho, for a minor traffic offense, but arrested him when he refused to produce a driver's license and gave the police a false name. They then gave Felder a *Miranda* warning. The same day they discovered the Texas fugitive warrant and held Felder on it pending extradition proceedings. The next day, Felder was arraigned on the fugitive warrant before an Idaho court in Bonneville County, Idaho. The court appointed a member of the local bar, R. John Insinger, Esq., to represent him.

Insinger consulted with Felder almost daily. He explicitly instructed the Idaho police not to question Felder about any of Felder's legal affairs unless he were present, and the police agreed. The Idaho police complied with the agreement; when they wished to question Felder about a reported murder in Denver, apparently unrelated to the Texas offense, they notified Insinger, who agreed to the interrogation and was present during it.

Members of the Houston police department also knew that Insinger represented Felder. Houston police officers spoke to Insinger twice by telephone in an effort to secure his cooperation in the extradition in exchange for a possible plea consession. Felder, on Insinger's advice, waived extradition.

Several days later, on April 23, 1975, a Houston police officer, J.W. Clampitte, who personally knew that a lawyer had been appointed to represent Felder, came to Idaho and, after giving Felder the *Miranda* warning, questioned him about the Texas charge. The interview was initiated by Clampitte without notice to Insinger, who did not consent to it and was not present. Clampitte obtained an oral and then later a written confession, the first paragraph of which recited the *Miranda* warning. Felder was then transported to Texas, where he was later indicted by the grand jury and tried for capital murder.

At Felder's trial, the Texas court ruled that Felder's confession was voluntary and admissible. Felder was convicted and sentenced to death in 1976. His appeal was denied by the Texas

1. *See, e.g.*, Texas Code of Crim.Proc.Ann. arts. 15.03, 15.04 (1977).

Court of Criminal Appeals in 1978[2] and his petition for a writ of certiorari was thereafter denied.[3]

Felder's execution was then scheduled. He thereafter filed petitions for habeas corpus in the Harris County district court and in the Texas Court of Criminal Appeals. The lower court recommended denial of the petition and denied a request for a stay of Felder's execution. The Court of Criminal Appeals later denied both a stay of execution and the habeas corpus petition. Neither court afforded petitioner an opportunity to be heard.

Felder then filed a federal habeas corpus petition in the United States District Court for the Southern District of Texas (Houston Division). On the same day, that court granted a stay of execution which is still in effect.

Because Felder had not exhausted his state remedies with respect of some of the claims asserted in the federal petition, he moved to dismiss his petition without prejudice so that the claims might be considered in the first instance by the state courts. The district court granted Felder's motion to dismiss, but this court reversed and remanded to the district court with instructions to proceed to the merits of the petition because the state had waived exhaustion.[4] This court's mandate issued on January 12, 1983. No further hearing of any kind was held in the district court. On April 24, 1984, the district court filed an opinion denying Felder's habeas corpus petition.

II.

The sixth amendment to the Constitution, made applicable to the states by the fourteenth amendment,[5] guarantees the accused in all criminal prosecutions the right "to have the assistance of counsel for his defense." This right, as the Supreme Court has reminded us in *Brewer v. Willaims,*

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2. *Felder v. State,* 564 S.W.2d 776 (Tex.Crim.App. 1978)(en banc).

3. *Felder v. Texas,* 440 U.S. 950, 99 S.Ct. 1433, 59 L.Ed.2d 640 (1979).

4. *Felder v. Estelle,* 693 F.2d 549 (5th Cir.1982).

5. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

"is indispensable to the fair administration of our adversary system of criminal justice" and is "vital ... at the pretrial stage."[6] We look to state law to determine when adversarial proceedings against the accused have commenced, implementing the sixth amendment right to counsel.[7] Here, as in *Brewer,* there can be no doubt that judicial proceedings had been initiated against Felder before Clampitte interrogated him. The filing of an affidavit and criminal complaint in a Justice of the Peace court constitutes the institution of formal judicial criminal proceedings in Texas.[8]

Clampitte knew a lawyer had been appointed to represent Felder. He testified, "the Sheriff's department there [in Idaho] had advised me he had been represented by an attorney prior to my arriving." Officer Clampitte asked Felder during interrogation whether he had conferred with a lawyer, and Felder said "yes." The state relies on a statement by the state trial court that Clampitte "understood" a lawyer had been appointed only to advise Felder about extradition, but Insinger's appointment was not so qualified and, as we have pointed out, he had in fact engaged in plea bargaining with the Houston police and had represented Felder in the investigation of the Denver matter.

There is no merit to the state's argument that Insinger's appointment terminated upon Felder's waiver of extradition. Insinger represented Felder as to all criminal matters facing the accused while he was present in Idaho, and the attorney was treated accordingly by both the Houston and Idaho police. As in *Brewer,* the police officer set out to obtain information from Felder knowing that counsel had been appointed to represent him and without making any effort to determine whether counsel had forbidden such interrogation or whether counsel wished to be present. Because Clampitte knew that Felder had an attorney and had conferred with the attorney, he should have inquired whether the attorney had forbidden interviews.

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6 430 U.S. 387, 398, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424, 436 (1977).

7. *Moore v. Illinois,* 434 U.S. 220, 227, 98 S.Ct. 458, 464, 54 L.Ed.2d 424, 433 (1977); *Kirby v. Illinois,* 406 U.S. 682, 688, 92 S.Ct. 1877, 1881, 32 L.Ed.2d 411, 417 (1972).

8. *Barnhill v. State,* 657 S.W.2d 131 (Tex.Crim.App.1983); *Bumgarner v. State,* (Tex.Ct.App. 1984). *See also Brewer v. Williams,* 430 U.S. 387, 398-99, 97 S.Ct. 1232, 1239, 51 L.Ed.2d 424, 436 (1977).

In *Brewer,* a murder suspect's attorney instructed the police not to question his client during a car ride from Davenport to Des Moines, Iowa. The police agreed. During the trip the police officers elicited incriminating statements from Williams by suggesting to him that the victim's body should be located and buried. While the officers had given the accused *Miranda* warnings before beginning the trip, they made no further effort to obtain a waiver of his right to the presence of counsel before eliciting incriminating responses. Quoting from its prior decision in *Massiah v. United States,*[9] a case involving different circumstances, the Court held that the accused was denied the sixth amendment right to counsel when the prosecutor used at his trial "evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[10]

"That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant," the Court said in *Brewer.*[11] That the *Brewer* statements were elicited over a longer interval and in response to the suggestion that the victim was entitled to a Christian burial is, if not equally consitutionally irrelevant, insufficient to distinguish Clampitte's deliberate interrogation of Felder. *Massiah* and *Brewer* establish a "clear rule ... that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[12] As the Court pointed out in a footnote to *Brewer,* the existence of an agreement by the police not to interrogate the accused in the absence of his counsel "provides [the state] with no argument for distinguishing away the protection afforded by *Massiah.*"[13]

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9. 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

10. *Brewer v. Williams, supra* n. 6, 430 U.S. at 400, 97 S.Ct. at 1240, 51 L.Ed.2d at 437.

11. *Id.*

12. *Id.,* 430 U.S. at 401, 97 S.Ct. at 1240, 51 L.Ed.2d at 438.

13. *Id.,* 430 U.S. at 401 n. 8, 97 S.Ct. at 1240 n. 8, 51 L.Ed.2d at 438 n. 8.

Brewer cannot be distinguished on the basis that in that case the accused had himself initially requested counsel and stated his desire to speak only in counsel's presence, while Felder's lawyer had forbidden interviews with his client. Insinger spoke for Felder as his counsel.[14] As in *Brewer,* it was counsel who "had made clear to the police that no interrogation was to occur...."[15] Indeed, the very purpose of assuring an accused the assistance of counsel is to give him representation by someone better prepared and more competent to speak for him to police and other authorities. Felder's I.Q. is 88, he is characterized as of low average intelligence, and, despite his prior brushes with the law, he was hardly as well qualified as his lawyer to understand the dangers implicit in interrogation by skilled police officers. As Clampitte testified at the suppression hearing, he elicited Felder's confession by marshalling the evidence against him and persuading him that the police knew what had happened. This was the very danger that Insinger, who protected his client fully and faithfully, sought to avoid.

The state relies upon the fact that Clampitte, by giving Felder *Miranda* warnings before questioning him, gave Felder an opportunity to assert his right to counsel and that he failed to do so. This dulls, if it does not miss, the point. Counsel had already been appointed for Felder, and had asserted, on Felder's behalf, in clear, unequivocal terms, Felder's right not to be interrogated in counsel's absence. Felder had not acted in a manner inconsistent with his lawyer's instructions or advice. Clampitte should never have begun the questioning session without first obtaining an unequivocal waiver. The Supreme Court in *Brewer* made clear that the mere giving of *Miranda* warnings, after the accused through his lawyer has instructed the police not to interrogate him, does not sanction that interrogation.[16]

III.

The state argues that Felder had the right to disregard his lawyer's advice, to waive his sixth amendment rights, and

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14. *See, e.g., Brewer, supra* n. 6, 430 U.S. at 405, 97 S.Ct. at 1242, 51 L.Ed.2d at 440.

15. *Id.*

16. *Brewer, supra* n. 6, 430 U.S. at 404, 97 s.Ct. at 1242, 51 L.Ed.2d at 439.

to speak to the police and that he did in fact waive his right to counsel. The right to the assistance of counsel may of course be waived. Whether it has been waived, however, is a factual inquiry. To establish a waiver of the previously-asserted sixth amendment right to the assistance of counsel, the Court held in *Brewer,* it is "incumbent upon the State to prove an intentional relinquishment or abandonment of a known right or privilege."[17] Courts must "indulge in every reasonable presumption against waiver."[18] We are to assess the "totality of the circumstances" in determining whether the purported waiver was voluntary and intelligent.[19]

Felder's written confession contained the statement, "I fully understand all these rights and desiring to waive all of them, I hereby make the following voluntary statement." Felder signed the written confession only after he had made the oral confession and hence had fully incriminated himself. The oral confession was, as is customary, reduced to writing. Signing the written confession was an after-the-fact confirmation and not a voluntary relinquishment of constitutional rights.

Here, as in *Brewer,* the record falls far short of sustaining the state's burden of showing a waiver of sixth amendment rights. Felder did not initiate the interview with Clampitte, and it was conducted not only after Felder's lawyer had advised him not to talk to the police but despite the lawyer's categorical instruction to the police not to question his client. Clampitte did give Felder a *Miranda* warning twice but Felder did not initiate the conversation, did not disavow his lawyer, and did not express any desire to talk either with police officers generally or with Clampitte personally in the absence of his attorney.[20] He gave no other affirmative indication of a desire

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17. *Brewer v. Williams, supra* n. 6, 430 U.S. at 404, 97 S.Ct. at 1242, 51 L.Ed.2d at 439 (citations omitted).

18. *Id.* (citations omitted).

19. *Wyrick v. Fields,* 459 U.S. 42, 46, 103 S.Ct. 394, 396, 74 L.Ed.2d 214, 218 (1982); *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

20. *Cf. Wyrick v. Fields,* 459 U.S. 42, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982).

to relinquish his previously-asserted right to the presence of counsel. As the Supreme Court established in *Brewer,* a waiver of the sixth amendment right to counsel requires more than a recital of *Miranda* rights; the state must prove not only that a defendant understood his right to counsel but that he relinquished it.[21] As we stated in *United States v. Massey,*[22] "a valid waiver will not be presumed simply from the fact that a confession was in fact eventually obtained ... or that a waiver was eventually signed."

Brewer requires the conclusion that the confession was obtained in violation of Felder's sixth amendment rights. As in *Brewer,* Felder's counsel instructed law enforcement authorities not to interrogate his client in his absence. The police initiated an interrogation of Felder in violation of counsel's instructions. Although Felder may have understood his sixth amendment right to the assistance of counsel during this interrogation, he did not waive the right to have counsel present. Because these facts are indistinguishable from those in *Brewer,* we must conclude that Felder did not voluntarily relinquish his sixth amendment right to the assistance of counsel and therefore the confession must be suppressed.

Because we decide this case under the sixth amendment, we express no opinion on Felder's rights under the fifth amendment guarantee of due process.[23]

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21. *Brewer v. Williams, supra* n. 6, 430 U.S. at 404, 97 S.Ct. at 1242, 51 L.Ed.2d at 439; *see Silva v. Estelle,* 672 F.2d 457, 458 (5th Cir.1982); *Edwards v. Arizona,* 451 U.S. 477, 485 n. 8, 101 S.Ct. 1880, 1885 n. 8, 68 L.Ed.2d 378, 386 n. 8 (1981).

22. 550 F.2d 300, 307-308 (5th Cir.1977).

23. *See Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), a 1981 decision not applicable here because it has been held not retroactive; *Solem v. Stumes,* _____ *U.S.* _____, *104 S.Ct. 1338, 79 L.Ed.2d 579 (1984); United States v. Priest,* 409 F.2d 491 (5th Cir. 1969); *Nash v. Estelle,* 597 F.2d 513 (5th Cir. 1979) (en banc); *Blasingame v. Estelle,* 604 F.2d 893, 895 (5th Cir. 1979); *United States v. Massey, 550 F.2d 300, 307 (5th Cir.1977); Silva v. Estelle,* 672 F.2d 457 (5th Cir.1982), and *Government of Canal Zone v. Gomez,* 566 F.2d 1289, 1291 (5th Cir.1978). *See also United States v. Hernandez,* 574 F.2d 1362, 1370 n. 16 (5th Cir. 1978) and authorities cited therein.

IV.

At oral argument, for the first time, the State contended that the use of Felder's confession was at worst harmless error because there was also evidence that he had orally admitted committing the crime to a friend in Denver, Edith Cobb, who testified for the State at the trial. Ms. Cobb testified that, before Felder was arrested in Idaho, he had told her that he had entered the apartment of a man he knew who had $1100 to $1300 in cash. He had carried a .38 revolver in case anyone tried to stop him. He had tried to get the money and, when the man recognized him, he had picked up a pair of scissors and stabbed the man to death, giving further details of the homicide. Ms. Cobb had given this account to the Denver police department and this had led to the filing of the charge against Felder and the issuance of the warrant for his arrest.

The thesis that two confessions do no more harm than one is ingenious, but one we have never adopted.[24] Ms. Cobb's oral recall of Felder's statement was far less impressive than the detailed account spelled out in his written confession, which is deliberate, lengthy, and precise. *Chapman v. California*[25] and a host of other cases[26] teach that, for constitutional error to be ignored, it must be harmless beyond a reasonable doubt. A mere comparison of Ms. Cobb's testimony with the written statement introduced at trial demonstrates the weight that a jury might put on the later written and signed statement. Harm is demonstrable. The state cannot show that admission of Felder's confession to the police officer was harmless beyond a reasonable doubt.

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24. *See United States v. Webb*, 755 F.2d 382 (5th Cir.1985), in which we reversed a conviction after holding that two of the three confessions introduced were obtained in violation of *Edwards*. *See also Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.1980) (en banc), *cert. denied*, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980).

25. 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

26. *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972); *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.1980), and authorities cited therein.

V.

According to Texas jurisprudence, a criminal defendant who testifies on his own behalf at the punishment phase of trial and admits guilt waives appellate review of evidentiary rulings found guilty, his counsel moved at the start of the punishment phase of the trial for an order preventing the prosecutor from asking Felder—in the event Felder elected to testify on punishment—whether he had committed the crime. The trial court refused to give this order and Felder elected not to testify at the punishment phase. The state concedes that it would have been improper to ask Felder at the punishment phase whether he was "guilty" or "not guilty." But to ask Felder whether he had "committed the crime" would have been an equivalent injury.

We do not consider whether, in the event of Felder's retrial, this "waiver rule" would impermissibly chill Felder's constitutional right to take the stand in his own behalf. The issue may never recur. The state may not elect to try Felder, Felder and the state may make some sort of plea bargain, or a new trial may be conducted and Felder may be acquitted. If he is convicted, the questions he may be asked at the punishment phase of a new trial may be different and may be directed only to actions he took, not to the ultimate issue of guilt or innocence. Accordingly, our expression of an opinion at this stage would be dicta on an important constitutional issue. Such issues should be decided only on a specific record and only when essential to decision.[28]

For these reasons, the judgment is REVERSED. The Clerk is directed to remand the case to the district court with directions to issue a writ of habeas corpus ordering Felder released from state custody unless within ninety days from the date of our mandate the state shall commence a new trial.

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27. *Gordon v. State*, 651 S.W.2d 793 (Tex.Crim.App.1983); *Smyth v. State*, 634 S.W.2d 721 (Tex.Crim.App.1982).

28. *E.g., Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Reetz v. Bozanich*, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SAMMIE FELDER, JR.,	§	
	§	
Petitioner	§	
	§	
V.	§	CIVIL ACTION NO.
	§	H-80-1220
W.J. ESTELLE, JR., Director	§	
TEXAS DEPARTMENT OF	§	
CORRECTIONS,	§	
	§	
Respondent	§	

Stefan Presser, Houston, Texas, PAUL, WEISS, RIFKIND, WHARTON & GARRISON (Peter Buscemi and Todd D. Stern), New York, New York, Attorneys for Petitioner.

Leslie A. Benitez, Assistant Attorney General, Austin, Texas, Attorney for Respondent.

MEMORANDUM AND ORDER:

Petitioner is under a death sentence rendered by a jury in the 176th District Court of Harris County, Texas. Petitioner's original application for writ of habeas corpus was amended in September of 1981 to allege three additional, unexhausted grounds for relief, and Petitioner moved for dismissal of the petition without prejudice in order to pursue his new grounds for relief in the state courts. This Court accepted the recommendation of the United States Magistrate that the application for writ of habeas corpus be dismissed without prejudice. The United States Court of Appeals for the Fifth Circuit reversed and instructed this Court "to reach the merits of Felder's habeas petition." *Felder v. Estelle,* 693 F.2d 549, 554 (5th Cir. 1982).

The Crime

The Texas Court of Criminal Appeals has summarized the activities which led to Petitioner's conviction and death sentence:

> The deceased (James Hanks), who was a quadraplegic, was a resident at an apartment complex in Houston designed and operated as a residence for paraplegics and quadraplegics. Appellant was an employee at this complex. The evidence, which includes appellant's written confession, establishes that on the night of March 14, 1975, appellant armed himself with a pistol and went to the apartments to "prowl around...looking for something to steal." Appellant entered the deceased's unlocked apartment and, after looking around for a few minutes, found a camera in a closet. He then approached the bed in which the deceased was sleeping and attempted to slip his hand under the pillow, where the deceased was known to keep his wallet containing a large amount of cash. The deceased awoke and said, "Sammie, what are you doing?" Appellant placed a pillow over the deceased's face, and after the deceased began shouting for help, appellant stabbed the deceased repeatedly in the neck and head with a pair of scissors he found on the night stand beside the bed. After the deceased stopped shouting, appellant took the wallet and camera and fled. The deceased died as a result of a stab wound in the temple which penetrated his brain.
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> After leaving the apartment complex, appellant had his brother drive him to the airport, from which he took a flight to Denver. On the way to the airport, he threw the deceased's wallet and the scissors from the automobile. Appellant remained in Denver for approximately one month, during which time he told a friend about the offense. Appellant left Denver in a stolen car, and was apprehended in Idaho Falls, Idaho, on April 14, 1975, after he was observed committing a traffic violation. *Felder v. State*, 564 S.W.2d 776, 778.

PROCEDURAL BACKGROUND

Petitioner complains of the judgment of conviction and sentence entered by the 176th Judicial District Court of Harris County, Texas. The judgment of conviction is dated June 23, 1976; an amended sentence of death by intravenous injection was signed and entered on March 11, 1980. Petitioner was charged with capital murder in violation of Article 19.03(a)(2) of the Texas Penal Code. Upon Petitioner's plea of not guilty trial was before a jury. Petitioner did not testify at either the guilt or penalty stages of the trial.

Petitioner appealed his conviction and sentence to the Texas Court of Criminal Appeals, which affirmed the judgment of the trial court on April 26, 1978, in *Felder v. State*, 564 S.W.2d 776 (Tex.Crim.App. - 1978). Petition for writ of certiorari was denied by the Supreme Court of the United States on March 5, 1979, in 440 U.S. 950.

Petitioner filed a writ of habeas corpus on May 29, 1980, in the 176th Judicial District Court of Harris County, Texas, pursuant to TEX.CRIM.PROC.ANN. §11.07 (Vernon 1977), which was denied by the Texas Court of Criminal Appeals on June 2, 1980. Petitioner received no hearing in the state courts regarding his habeas corpus petition. In his state court habeas proceedings Petitioner challenged his conviction and sentence as being in violation of rights guranteed him by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Petitioner's Alleged Grounds for Relief in this Federal Habeas Petition[1]

In this petition Felder claims that his conviction and sentence were obtained and imposed in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. More specifically, Petitioner contends (1) that his confession was obtained unconstitutionally; (2) that the prosecution's concealment of evidence deprived Peti-

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1. Petitioner's Amended Petition for Writ of Habeas Corpus by a Person in State Custody (hereafter "Petition") was filed on October 7, 1981.

tioner of his constitutional rights to effective assistance of counsel and due process of law; (3) that Petitioner was the victim of unconstitutional prosecutorial misconduct; (4) that Petitioner was denied the effective assistance of counsel; (5) that the Texas "waiver rule" is constitutionally defective; (6) that the exclusion of a prospective juror because of the opposition to the death penalty was improper; (7) that Petitioner's sentence of death by lethal injection constitutes cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

In considering Petitioner's grounds for relief this Court must determine whether Petitioner has been the victim of unconstitutional treatment by the State of Texas during his trial and pending execution. Findings of fact by state courts in 28 U.S.C. §2254 cases are entitled to a "presumption of correctness" on the part of a reviewing federal court, especially "in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court..." *Sumner v. Mata*, 449 U.S. 539, 547 (1981). The high measure of deference accorded state court findings requires "that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair [ ] support' in the record." *Marshall v. Lonberger*, _____U.S._____, 103 S.Ct. 843, 850 (1983).

Petitioner's Confession

On April 23, 1975, Detective J.W. Clampitte of the Houston Police Department went to Idaho Falls, Idaho, to question Petitioner about the Hanks murder and to bring Petitioner back to Texas. Before the conversation began Clampitte read Petitioner his *Miranda* rights. Although initially denying his guilt, Petitioner soon made an oral admission that he had murdered Hanks. Petitioner responded affirmatively when asked if he had spoken with a lawyer previously. A written document entitled "Advising of Rights and Waiver" was signed by Petitioner. His statement was then reduced to writing in a document styled "Voluntary Confession;" this instrument was read and signed by the Petitioner and witnessed by three police officers. At no time did Petitioner indicate a desire to terminate the interview or request the presence of legal counsel.

The events surrounding Petitioner's arrest and confession were the subject of two state court hearings on October 17, 1975, and May 19, 1976. The trial judge entered findings of fact on May 21, 1976, concluding that the confession was admissible at trial since it "was freely and voluntarily made, without compulsion or persuasion." Tr. Vol. I, 150,[2] only after Petitioner was informed of and had waived all applicable constitutional rights.

The duty of this Court to "examine the entire record and make an independent determination of the ultimate issue of voluntariness," *Jurek v. Estelle*, 623 F.2d 929, 931 (5th Cir. 1980), *cert. denied* 450 U.S. 1001 (1981), conflicts with the well established rule that findings of fact in state court habeas proceedings are entitled to a presumption of correctness. *See Dunn v. Maggio*, 712 F.2d 998, 1000-01 (5th Cir. 1983); *ante* at 4. The Fifth Circuit has resolved this conflict by holding that "the voluntariness of a confession is a mixed question of law and fact." *Gray v. Lucas*, 677 F.2d 1086, 1107 (5th Cir. 1982), *cert. denied* 103 S.Ct. 1887 (1983), *reh'g. denied* 103 S.Ct. 3099; *Brantley v. McKaskle*, 722 F.2d 187, 188 (5th Cir. 1984). While this Court must defer to the state court findings unless they are clearly erroneous, the conclusions drawn from those facts is subject to the independent review of this Court. *Id.*, 189.

In order to find the constitutionally required voluntariness in Petitioner's confession, *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973), the record must show that "he made an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him. The burden of proving facts which would lead to an opposite conclusion is on the habeas corpus applicant." *Jurek v. Estelle*, 623 F.2d at 937. Petitioner challenges the voluntariness of his confession on two grounds: (1) that "the Houston police interrogated petitioner and took a statement without notice to and in the absence of petitioner's court-appointed local counsel," Petition 7, and (2) that Officer Clampitte threatened Petitioner with

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2. The State court records in this case have been paginated more than once. References in this opinion are to the numbers which are stamped at the bottom lefthand corner of each page.

physical harm if he refused to confess. *Id.*, 10. While it is undisputed that R. John Insinger, an Idaho Falls lawyer, had been appointed to represent Petitioner, Officer Clampitte understood that to involve only the extradition proceedings, which Petitioner decided to waive on the advice of Insinger. While this challenge to the confession might go "to the inferences drawn from the facts" and hence be subject to independent examination by this Court, *Brantley v. McKaskle*, 722 F.2d at 189, this Court refuses to reject the finding of the state court that Petitioner properly waived his right to legal representation during questioning. The record established that Petitioner had a history of prior involvement with law enforcement officials and was likely aware of the consequences of confessing. This prior experience also lessens the impact that Petitioner's admittedly low intelligence has upon evaluating the entirety of the circumstances surrounding his confession, *see Jurek*, 623 F.2d at 937-38, and suggests that he made " 'an intentional relinquishment or abandonment of a known right or privilege.' " *Brewer v. Williams*, 430 U.S. 387, 404 (1977) *quoting Johnston v. Zerbst*, 304 U.S. 458 at 464 (1938). Petitioner's claim of physical threats being used to extract the confession involuntarily is based entirely on a disputed fact which has not been shown to be clearly erroneous. *See Brantley v. McKaskle*, 722 F.2d at 189. Petitioner's claim of an involuntary confession must be denied.

Concealment of Evidence[3]

When Petitioner was arrested in Idaho Falls, Idaho, he had in his possession a .38 caliber pistol. Petitioner claims that he was not given an opportunity to inspect the pistol before it was introduced in the penalty phase of the trial, and that this "concealment of evidence" violated Petitioner's Fifth and Fourteenth Amendment rights to due process of law, his Sixth Amendment right to the effective assistance of counsel, and his Eighth and Fourteenth Amendment protection against cruel and unusual punishment.

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3. The Court of Criminal Appeals discussed the physical introduction of the pistol only in the context of the claim of improper conduct by the prosecutor. 564 S.W.2d at 778-79.

The record discloses that Petitioner's counsel had filed a motion for discovery of physical evidence prior to a suppression hearing on October 17, 1975. At that time the prosecutor allowed defense counsel to inspect any and all physical evidence. Tr., Vol. I, 225. In his opening statement at trial the State's lawyer mentioned that the pistol had been found when Idaho Falls police officer Brent Carlson arrested Petitioner. Edith Cobb testified that Petitioner admitted to her that he had a gun in his possession at the time of committing the offense and when he fled to Idaho. When the pistol was introduced at the punishment phase of the trial, defense counsel objected that he had not had a chance to inspect the pistol when he examined other physical evidence in the case. This was because the pistol had been in the possession of Officer Clampitte from the time he obtained it in Idaho. Tr. Vol. VIII, 3242. The trial court then made the tangible evidence available to defense counsel.

Petitioner claims that his counsel was surprised by introduction of the pistol, and was unprepared "to impeach, rebut or counter" the impact of the pistol in the minds of the jurors. While a due process interest is implicated when a criminal defendant is denied the chance to examine evidence, *White v. Maggio,* 556 F.2d 1352, 1355 (5th Cir. 1977), the withheld evidence must be "material evidence of substantial probative force that 'could induce a reasonable doubt in the minds of enough jurors to avoid a conviction.' " *Gray v. Rowley,* 604 F.2d 382, 383-84 (5th Cir. 1979), *cert. denied* 445 U.S. 944 (1980), *quoting White v. Maggio,* 556 F.2d at 1357-58. Here the testimony of several witnesses prior to introduction of the pistol itself provided the additional evidence to support his conviction and sentence of death based upon possession of the gun. The record does not support Petitioner's claim of materiality since there is no reasonable doubt that the jury would not have imposed the death sentence absent physical introduction of the pistol. Nor does the record sustain the claim that the State deliberately suppressed the pistol from Petitioner with the goal of gaining an unfair tactical advantage. Defense counsel was informed of the existence of the pistol well before the punishment phase of the trial, but did not request access to it. The prosecuting lawyer noted that Petitioner's request would have been complied with when made.

Prosecutorial Misconduct

Petitioner claims that his trial was constitutionally unfair because of prosecutorial misconduct during the penalty phase of the trial. Petitioner protests certain "intemperate remarks, inflammatory speculation lacking any evidentiary basis, and attacks on defense counsel, all made in flagrant disregard of repeated admonitions by the Court." Petition, 16. Petitioner claims that the prosecutor violated instructions from the trial court by repeatedly and knowingly introducing inadmissible evidence during the guilt phase of the trial. At the penalty phase of the trial Petitioner complains that the prosecutor three times went beyond the evidence when he asked the jury to assume that Petitioner's prior lack of violent crimes was only because he had had no previous opportunity to cause physical harm. These comments were followed by instructions from the bench to the jury to disregard the comments, and a denial of defense counsel's motion for a mistrial. The complained of "inflammatory attacks on defense counsel," Petition 18, stem from two remarks made by the State's lawyer during the penalty phase:

> "You know, some lawyers just keep trying to object to break the prosecutor's train of though when he gets a little warm."
> Tr. Vol. VIII, 3474.
> "That motion in limine was placed on defense counsel's conduct as well."
> *Ibid.*, 3475.

The alleged misconduct of the prosecutor must be viewed in the context of the entire trial, *Houston v. Estelle*, 569 F.2d 372, 377 (5th Cir. 1978), and Petitioner will be afforded habeas corpus relief only in the most egregious cases where improper jury argument is so prejudicial as to render the trial fundamentally unfair. *Cronon v. Alabama*, 587 F.2d 546, 551 (5th Cir. 1979), *cert. denied* 440 U.S. 974; *see also O'Bryan v. Estelle*, 714 F.2d 365, 389 (5th Cir. 1983). The Texas Court of Criminal Appeals rejected Petitioner's claims of improper acts by the prosecutor and found that the prosecutor's comments regarding Petitioner's possession of the gun during commission of the murder was supported by Edith Cobb's testimony that Petitioner "had

a gun in case anyone tried to stop him." *Felder*, 564 S.W.2d at 779. The Court also found that any improper conduct by the prosecuting attorney was cured by instructions from the bench. *Id.* When subjected to the independent review of this Court, *Brantley v. McKaskle*, 722 F.2d at 189, the facts determined by the state courts rebut the contention that Petitioner was victimized by prosecutorial misconduct.

Ineffective Assistance of Counsel

Petitioner's next claim is that he was denied effective assistance of counsel "(t)hroughout the voir dire, guilt and penalty stages of the trial." Petition, 20. Specifically, Petitioner complains of the failure of his lawyer (1) to offer any mitigating evidence at the penalty phase of the trial and (2) to challenge for cause or otherwise strike a juror who acknowledged on voir dire that Petitioner's race might be a factor in making his decision. *Id.* The *en banc* decision in *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982), *cert. granted*, _____U.S._____, 103 S.Ct. 2451, establishes the standard by which claims of ineffective assistance of counsel will be judged: "the petitioner has the burden of persuasion to demonstrate that the ineffective assistance created not only 'a *possibility* of prejudice, but that (it) worked to his *actual* and substantial disadvantage.' " *Ibid.*, 1258.

The record discloses that Petitioner's lawyer conducted a vigorous defense by cross examining adverse witnesses and objecting frequently. Petitioner now complains of the failure of his attorney to introduce "psychological testimony...at the crucial sentencing phase of his trial that...might have served as mitigating evidence." Petitioner's traverse and reply to Respondent's motion to dismiss and transfer, 17. This is a puzzling argument because introduction of the psychiatric evaluation of Petitioner would have revealed that, although Petitioner is of subnormal intelligence, he was adjudged to be capable of conforming his conduct to the requirements of the law. Tr. Vol. I, 76. Petitioner did not call his Idaho attorney to testify, although his affidavit discloses nothing that would have aided Petitioner's case.

Petitioner does not identify the venireman who supposedly stated that Petitioner's race would be a factor of decision. This claim lacks the specificity and support needed for review, and is rejected.

Petitioner's legal representation did not work to his "actual and substantial disadvantage," *Washington v. Strickland*, 693 F.2d at 1258, and he was not the victim of unconstitutional ineffective assistance of counsel.

The Texas "Waiver Rule"

A Texas criminal defendant who admits his guilt at the penalty phase of the trial waives all constitutional objections arising from earlier portions of the trial. *See Dugger v. State*, 543 S.W.2d 374 (Tex.Crim.App.—1976). Petitioner claims that this rule imposes an unconstitutional dilemma on a capital defendant, who "must elect either to exercise his fundamental right to plead in his own behalf and to offer evidence in mitigation of capital punishment, or to preserve his claims of constitutional error; he cannot do both." Petition, 21. This dilemma allegedly creates (1) a due process violation by conditioning the exercise of his Eighth Amendment right to take the stand and plead for mitigation upon an exercise of his Fifth Amendment right against self-incrimination and (2) a violation of the Eighth Amendment right to have all mitigating circumstance considered. Petitioner's claim is that this consitutional dilemma would have been imposed upon his client "at the punishment phase of his trial in the event that the prosecutor asked petitioner whether he had committed the crime." Petition, 21.

This convoluted argument is easily rejected. The rule of which Petitioner complains does not create a constitutional dilemma; the defendant can always exercise his Fifth Amendment right *not* to respond to the State's question of whether or not he committed the crime, and yet testify as to any factors which would mitigate punishment. The Texas waiver rule is not constitutionally defective.

Voir Dire Violations

At voir dire Mrs. Esther Moore was excused as a potential juror as a result of her responses to questions regarding her unwillingness to prescribe the death sentence. Tr. Vol. III, 1330-31. Mrs. Moore stated that she did not believe in captial punishment, *Ibid.*, 1326, and that she could not give an affirmative answer to the questions that would result in imposition of the death sentence. *Ibid*, 1328, 1329. As a result of these responses, the trial court excused Mrs. Moore "for cause," presumably based on TEX. PENAL CODE ANN. §12.31(b) (Vernon 1974). Petitioner now claims that this violates the holding of *Witherspoon v. Illinois,* 391 U.S. 510 (1968).

The state may constitutionally excuse jurors who are "so unequivocally opposed to the death penalty that they would not follow the law on the subject." *Smith v. Balkcom,* 660 F.2d 573, 578 (5th Cir. 1981), *cert. denied* _____U.S._____, 103 S.Ct. 181 (1982). Even more recently, the Fifth Circuit has stated its views on the *Witherspoon* notion that a state may excuse prospective jurors for cause where they express conscientious objections to the death penalty:

> The state does not run afoul of *Witherspoon* where the excluded juror has unequivocally stated his or her inability to vote for the death sentence without regard to the evidence adduced. E.g., *Bell v. Watkins,* 692 F.2d 999, 1006 (5th Cir.), *cert. denied,* _____U.S._____, 104 S.Ct. 142, 77 L.Ed. 2d _____ (1983); *Williams v. Maggio,* 679 F.2d 381, 384 (5th Cir. 1982) (en banc), *cert. denied,* _____U.S._____, 103 S.Ct. 3553, 77 L.Ed.2d 1339 (1983). Even though the juror may equivocate initially, exclusion comports with our interpretation of *Witherspoon* if the juror ultimately concludes that he or she opposes the death penalty irrevocably. *See id.* at 385-89; *O'Bryan v. Estelle,* 714 F.2d 365, 381 (5th Cir. 1983).

Sonnier v. Maggio, 720 F.2d 401, 405 (5th Cir. 1983).

Although Mrs. Moore initially indicated her willingness to render a death verdict in certain "(v)ery rare cases," Tr. Vol. III, 1304, *see also id.,* 1312, 1327, it became clear from her

answers that she was irrevocably opposed to the death penalty, Tr. Vol. III, 1324, 1326, and her exclusion did not violate the holding of *Witherspoon* or of *Sonnier v. Maggio, supra.*

The Texas Death Penalty Statute

Petitioner claims that the Texas statutory scheme for imposing the death sentence violates the Eighth and Fourteenth Amendments, both generally and as applied in Petitioner's case. As to his own case Petitioner argues that "the jury's finding of deliberateness was based on an unconstitutionally vague standard that failed to channel the jury's discretion," Petition, 27, and that there was insufficient evidence of dangerousness and deliberateness to justify imposition of the death sentence. *Ibid,* 29. As to the Texas statutory scheme in general, Petitioner argues that the law is consitutionally defective because (1) the Texas Court of Criminal Appeals fails to review death sentences to determine whether they are excessive or disproportionate and (2) the statutory framework does not provide the discretion required by the Supreme Court in death penalty statutes.

The Texas statute[4] provides for the death penalty where the jury determines that the defendant acted "deliberately" in causing the death of the deceased and "where there is a probability that the defendant would commit criminal acts of continuing threat to society." TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1977). There is no basis for Petitioner's claim that the jury did not know what "deliberately" meant. The argument that there was insufficient evidence of Petitioner's deliberateness and dangerousness was rejected by the Texas Court of Criminal Appeals. *Felder,* 564 S.W.2d at 778. As the Court pointed out, Petitioner had three prior prison terms which had no apparent impact in deterring him from committing additional crimes. In addition to the particular brutality of the murder, the evidence established that Petitioner was armed both when he committed the offense and when he was arrested, and that he stated his intent to use his weapon against anyone who would try to apprehend him. These state court find-

4. Subsection (e) was amended by the Legislature in 1981, becoming effective on August 30 of that year.

ings, entitled to deference by this Court, fully support the special verdict of the jury as to Petitioner's dangerousness and the deliberate nature of the offense.

Petitioner's broadside attack on the Texas capital punishment law has been rejected by the Supreme Court of the United States in several cases. Texas was one of many states which responded to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and "promptly redrafted [its] capital sentencing statue [ ] in an effort to limit jury discretion and avoid arbitrary and inconsistent results." *Pulley v. Harris*, 104 S.Ct. 871, 876 (1984). The Texas statue was specifically considered and upheld by the Supreme Court in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), where the Court stated:

> "Texas' capital sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of captial murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution."

In *Pulley v. Harris, supra*, the Supreme Court recently rejected the claim that proportionality review in death cases is a con-

stitutional requirement.[5] The Court specifically reaffirmed the constitutional validity of the Texas capital punishment law:

> The Texas statute reviewed in *Jurek*, like the Florida statute reviewed in *Proffitt*, did not provide for comparative review. We nevertheless concluded "that Texas' capital sentencing procedures, like those of Georgia and Florida," were constitutional because they assured "that sentences of death will not be 'wantonly' or 'freakishly' imposed." 104 S.Ct. at 883. (Stevens, J. concurring).

The existence of "meaningful appellate review", *Id.*, and the limited discretion of the jury, in the Texas statute, *Id.*, 879, assures its constitutional vitality.

Petitioner's allegation that "the death penalty is discriminatorily applied in cases with poor, male and black defendants and white victims" Petition, 20, does not, as a general matter, entitle Petitioner to relief,[6] and Petitioner provides no facts to support the claim that his conviction and sentence were the result of racial animus. Petitioner's claim that death by lethal injection constitutes cruel and unusual punishment must be rejected. *See Estelle v. Gamble*, 429 U.S. 97 (1976); *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983), *cert. denied* 104 S.Ct. 211; *O'Bryan v. McKaskle*, No. 84-2182 at 7, (5th Cir., March 29, 1984). *Ex Parte Granviell*, 561 S.W.2d 503 (Tex.Crim.App. 1976), *cert. denied* 431 U.S. 933 (1978).

Petitioner's final argument that death by lethal injection under the Texas statute is an unconstitutional ex post facto law is without merit.

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5. "The issue in this case, therefore, is whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Harris insists that it does and that this is the invariable rule in every case. Apparently, the Court of Appeals was of the same view. We do not agree." *Pulley v. Harris*, 104 S.Ct. at 876.

6. Justices Brennan and Marshall are convinced that decisions of the lower federal courts and scholarly research will eventually lead the Supreme Court to consider whether the death penalty is unconstitutional because of its application to defendants of different races. *Pulley v. Harris*, 104 S.Ct. at 887-88.

It is therefore ORDERED, ADJUDGED and DECREED that Petitioner's writ of habeas corpus be DENIED in all respects. Petitioner's motion for an additional hearing is DENIED. As the record establishes no non-frivolous ground upon which Petitioner may reasonably rely for relief, *Coppedge v. United States*, 369 U.S. 438, 445 (1961), the Court finds that Petitioner's motion to proceed in forma pauperis, if granted, would result in an appeal not taken in good faith. Said motion is hereby DENIED. 28 U.S.C. §1915; FED.R.APP.PROC. 24(a).

DONE at Houston, Texas, this 24th day of April, 1984.

/s/

United States District Judge